



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Applications Research Corporation

File: B-230097

Date: May 25, 1988

DIGEST

1. It is not inherently improper for an awardee to recruit and hire personnel employed by the prior incumbent contractor; whether such action may be grounds for a civil action against the awardee is not a matter to be resolved in a protest to the General Accounting Office.
2. Protest that awardee improperly substituted personnel after award is without merit where, contrary to the protester's allegations, the solicitation did not prohibit or limit substitutions of personnel, but merely required agency approval, which the awardee obtained.
3. Generally, it is not improper for an agency to award a contract to a firm that employs former agency personnel.
4. Where an agency reasonably considers proposals to be technically equal, price may become determinative in making award even though the solicitation assigned price less importance than technical considerations.

DECISION

Applications Research Corporation (ARC) protests the award of a contract to Information Network Systems, Inc. (INS), under request for proposals (RFP) No. N62269-87-R-0353, issued by the Naval Air Development Center (NADC), Warminster, Pennsylvania. We deny the protest.

The contract is for data technician services for a 1-year base period and two 1-year option periods. The solicitation required offerors to submit fixed hourly labor rates for 10 full-time Class A data technicians and 10 Class B data

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technicians.^{1/} Each offeror was to provide resumes for all proposed personnel and to indicate which personnel were currently in the offeror's employ and which would be new hires. The RFP provided that price would be secondary to technical factors (personnel, management plan, and corporate background) in selecting a proposal for award, but that price would increase in importance as proposals approached technical equality. The agency received six proposals in response to the RFP, four of which the agency found to be acceptable. The agency awarded a contract without discussions to INS, the offeror with the lowest-priced, technically acceptable proposal.

PROTEST ISSUES

The protester, who was the prior data services contractor, has raised a number of objections with respect to the award to INS, all of which may be grouped under three major issues:

Hiring by INS of ARC personnel

ARC's principal complaint is that INS hired away from ARC a substantial portion of the latter's workforce. ARC alleges that of the 19 full-time employees currently employed by INS on the data services contract, 18 are former ARC employees. ARC cites solicitation clause L71A, which requires offerors to provide detailed resumes for all proposed personnel, and suggests that this clause should be interpreted as prohibiting the "wholesale substitution" of personnel. ARC also cites solicitation clause B3A in support of its position. That clause provides:

"Performance shall be accomplished by contractor personnel in each category having qualifications as represented by the contractor in its proposal as finally accepted by the government."

According to the protester, INS submitted its proposal fully intending to perform the required services with ARC personnel, and not the personnel identified in INS'

^{1/} The solicitation required all 10 Class A data technicians to have at least 2 years of experience in office procedures involving clerical processing. Two of the 10 also had to have 3 of years supervisory experience. The 10 Class B data technicians were required to have 1 year of experience in office procedures.

proposal. In this regard, ARC notes that INS stated in its proposal that it would "strive to hire as many of the incumbent's high quality personnel as possible."

ARC further notes that the written comments of the agency's evaluators indicate that this recruitment plan was considered a strong point in the INS proposal, and concludes from this that the agency improperly evaluated the INS proposal based on the qualifications and experience of ARC's employees rather than the personnel INS proposed.

Finally in this regard, ARC contends that the recruiting by INS of ARC employees constituted improper interference by INS with ARC's contractual relationships with those employees. ARC argues that the agency therefore should have found that INS is not responsible.

Unfair advantage

The second major issue area in this case concerns ARC's belief that INS had an unfair advantage in this procurement and benefited from favoritism on the part of the agency. In this regard, ARC notes that two former employees of NADC currently hold positions with INS. One of these individuals, the current INS comptroller, had access while an NADC employee, claims ARC, to pricing information submitted to the agency in connection with prior contracts. ARC suggests that this individual used the information to allow INS to underbid ARC in this procurement. This individual is also a close personal friend of the head of the agency's technical evaluation team, ARC asserts. ARC also argues that the presence of two former NADC employees in the INS organization creates the appearance of a conflict of interest, which ARC suggests is proscribed by solicitation clause H52. Clause H52 provides that during contract performance the contractor will not use any active-duty Navy personnel as consultants or employees without first obtaining the approval of the contracting officer.

Further, ARC cites certain events occurring after award that it says indicate agency favoritism toward INS. First, there is some question between NADC and INS concerning a contract clause requiring the contractor to furnish three personal computers. NADC contends that the clause requires the contractor also to furnish keyboards and monitors, while INS claims to have read the clause as not including these other items. The agency is considering whether to modify the contract with INS to reimburse that firm for the cost of providing the peripherals. Second, the agency also is considering a modification to the contract that would increase from 20 to 21 the number of data technicians the contractor is required to provide. Third, ARC contends that

NADC relaxed the security requirements that ordinarily would apply in order to benefit INS. Finally, ARC complains that after award NADC furnished INS with a more detailed statement of the work (SOW) than that contained in the RFP, and which ARC had prepared as the incumbent. ARC appears to be arguing that this suggests NADC is changing the requirements.

Improper evaluation

In its comments on the agency's report on this protest, ARC questioned the propriety of the evaluation based on information contained in that report. Specifically, NADC reported to us that in reviewing ARC's agency-level protest (which concerned the issues discussed above), it discovered that its method of evaluating proposals may not have been consistent with the terms of the solicitation. The agency evaluated proposals on a pass-fail basis; in other words, proposals were determined to be either acceptable or unacceptable, and award was made on the basis of the lowest-priced, acceptable proposal. The RFP, on the other hand, appeared to contemplate that proposals would be rated under the three technical evaluation factors and compared on the basis of relative technical merit, which would be a more important consideration than price. The agency reports that after receiving ARC's agency-level protest, it requested the evaluation panel (excluding the head of the evaluation team, who had been mentioned in the protest) to reevaluate the proposals of ARC and INS using a numerical grading scheme. The result of this reevaluation was that the INS proposal had a "slight edge" over the ARC proposal (391 points versus 383), and the agency concluded that there was virtually no technical difference between the two proposals.

In addition to complaining that the pass-fail evaluation was not consistent with the terms of the RFP, ARC complains that the award to INS was based solely on price. The protester contends that the agency should have found its proposal to be technically superior and should have conducted negotiations with the firm to obtain the most advantageous price. ARC also points out that the scoring under the reevaluation was not consistent with the notes made by the evaluators in connection with the first evaluation.

Based on its various contentions, ARC seeks a recommendation from this Office that the contract with INS be terminated and that award be made to ARC. In the alternative, ARC contends that the agency should resolicit, but should exclude INS from competing.

AGENCY POSITION

The agency acknowledges that the bulk of the workforce INS is using to perform the data services contract consists of former ARC employees and that INS listed none of these individuals in its proposal. The agency argues, however, that while it might be unusual for a contractor to commence contract performance with a workforce different from that proposed, such action was not prohibited under the terms of the solicitation. Specifically, the agency notes that clause B3A, quoted above, does not require the awardee to perform the contract with the same personnel listed in its proposal, nor is such a requirement contained in clause L71A. In fact, the agency points out, the solicitation expressly provided for substitution of personnel, subject to approval by the contracting officer.2/

The data services being procured in this case, says the agency, are quite basic; this is not the type of work for which strict limits on the substitution of personnel through a "key personnel" clause would have been appropriate. While an offeror was required to demonstrate in its proposal an ability to perform with a qualified staff, the agency reports that it was not concerned that performance be accomplished by particular individuals. In this regard, that agency states that the personnel INS listed in its proposal were fully acceptable, as were the former ARC employees that INS currently is using.

ARC's contention that INS improperly interfered with existing employment contracts is a private matter between ARC and INS, argues the agency. The agency says it has no knowledge of improper actions by NADC personnel in this regard.

With respect to ARC's contentions concerning the unfair advantage or favoritism that INS may have enjoyed in the procurement, the agency concedes that two INS employees formerly worked for NADC and that both continue to have friends there. The agency submits, however, that there is no basis for concluding that INS therefore had an unfair advantage over its competitors. The agency notes that only one evaluator on the three-member evaluation panel even knew the former agency employees, and he did not know them well. The agency argues that it is unlikely that this evaluator's

2/ The agency reports that, after award, INS proposed a substitution of personnel to the contracting officer's technical representative and obtained his approval; the contracting officer learned of the substitutions the day contract performance began and had no objection.

knowledge of the two employees could have affected the outcome of the competition since the initial evaluation was on a pass-fail basis, and the second (numerical) evaluation was performed without this individual's participation.

The agency contends that there is no indication that the two former NADC employees acted improperly. Specifically, the agency says that its investigation has failed to uncover evidence that INS' current comptroller took with him any cost information pertaining to ARC's previous contracts when he left NADC. In any event, the agency points out that any prospective competitor could have learned of ARC's wage rates, for example, by interviewing ARC's employees, and also could have estimated ARC's overhead rate with a fair degree of accuracy.

With respect to ARC's allegations concerning events occurring after award, the agency reports that it is still considering whether to pay for the peripheral computer equipment and that no decision has been made yet. The cost of the equipment would be approximately \$1,000, according to the agency. The contract also may be modified, says the agency, to increase the required man-years from 20 to 21, but this too still has not yet been determined. Finally, NADC acknowledges that it did provide INS with an earlier draft of a SOW that ARC had prepared at the request of the agency describing the work that ARC was required to perform under its prior contracts.

ANALYSIS

We have reviewed each of ARC's contentions carefully, and we find none of them to have merit. First, we have recognized that it is neither unusual nor inherently improper for an awardee to recruit and hire personnel employed by an incumbent contractor. See Gem Services, Inc., B-217038.2, Feb. 7, 1985, 85-1 CPD ¶ 159. Whether such action may be grounds for a civil action against INS is not for us to decide; that issue is basically a dispute between private parties, which this Office will not resolve in the context of a protest. Id.

Contrary to the protester's contention, the solicitation did not impose any limitation on the number of changes in personnel the contractor could make after award. Rather, the solicitation merely required the contractor to obtain the agency's approval for all substitutions. INS complied with this requirement. There also was no requirement that the contractor commence performance with the personnel listed in its proposal. Clause B3A merely required that the

personnel actually used during contract performance be as qualified as the personnel listed in the contractor's proposal.

We recognize that INS disclosed in its proposal that it would recruit and hire ARC personnel and that the agency regarded this as a strength in the INS proposal. The record does not support the protester's contention, however, that the agency evaluated the INS proposal on the basis of ARC's personnel rather than those proposed by INS. From our review of the record, there also is no indication that, as the protester alleges, the agency either encouraged or required INS to use ARC personnel in the performance of the contract.

ARC's allegation that INS had an unfair advantage is based on the presence of the two former NADC employees on INS' staff and on events occurring after award. None of the circumstances cited by ARC leads us to conclude that this procurement should be disturbed.

As a general rule, it is not improper for an agency to award a contract to a firm that employs former agency personnel.^{3/} ARC has not cited any statute or regulation that may have been violated by the award to INS, and we have no reason to question the agency's statement that none of the evaluators were friends of the former agency employees or were otherwise biased in their evaluations of the proposals. In this regard, the agency employee that ARC contends was a personal friend of the INS comptroller was not involved in either of the evaluations of the proposals.

While ARC argues there was a violation of solicitation clause H52 concerning a contractors use of Naval personnel as consultants or employees, we do not agree. There is no indication in the record that INS hired or intends to hire any active-duty Navy personnel during its performance of the contract.

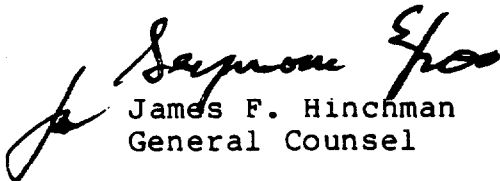
We also find no merit in the protester's contention that the noted postaward events show that INS benefited from agency favoritism. Even assuming that postaward events sometimes might indicate that agency bias may have existed at the time of award, the events complained of here do not. The agency

^{3/} While there are restrictions on the nature and scope of dealings that former government employees may have with their former agencies, e.g., 18 U.S.C. § 207 (1982) (restricting representational activities by former government officers or employees), ARC has not alleged that a violation of any post-employment statute occurred here.

has not even decided yet whether to modify the contract with respect to the computer equipment and the additional data technician, and the fact that the agency may have relaxed some security requirements and provided INS with a more detailed SOW^{4/} seem to us to be more in the nature of routine contract administration than indicative of improper agency motives at the time of award.

Finally, we find that the award to INS was consistent with the award provision of the RFP. The solicitation listed price as a secondary consideration, but advised offerors that the importance of price would increase as proposals approached technical equality. The agency initially concluded that the proposals submitted by INS and ARC both were acceptable, and later found virtually no technical difference between the two proposals. We have reviewed the proposals and the comments of the evaluators and conclude that the agency's determination of technical equivalence is fully supported by the record. Award to INS (whose offer was approximately \$100,000 lower than that of ARC) on the basis of price thus is unobjectionable. See Cobro Corp., B-228410, Dec. 16, 1987, 87-2 CPD ¶ 600.

The protest is denied.


James F. Hinchman
General Counsel

4/ We have reviewed both the SOW contained in the RFP and the SOW provided to INS after award, and while the latter may be more detailed, it does not appear to alter the scope of the work required.